STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2012
v	No. 301226 Kalamazoo Circuit Court
KEVIN DELANDO TURNER, Defendant-Appellant.	LC No. 2010-000090-FC

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of bank robbery, MCL 750.531. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 95 months to 25 years' imprisonment. Defendant appeals as of right and for the reasons set forth in this opinion we affirm defendant's conviction and sentence.

I. FACTS

On August 3, 2009, Audry Loosier was employed as a teller with the National City Bank in Kalamazoo, Michigan. While working at the bank, a man walked into the bank and approached Loosier's teller window. The man said to Loosier: "I'm serious, give me your large bills." The man placed his hand in his pocket insinuating that he had a weapon. Loosier gave the man $1,600 to $1,700 in $100 and $50 bills. The man set an envelope down at Loosier's window to collect the money, but before Loosier could place the money into the envelope, the man grabbed the money and left. Loosier testified that during the robbery the man was two feet away from her and the whole incident lasted less than a minute. When the police arrived following the robbery, Loosier noticed that the envelope was left on the counter in front of Loosier's window. She gave the envelope to the police. Partial fingerprints and a partial palm print were found on the envelope which were matched to defendant. Loosier was not able to identify a suspect from a police lineup.

Rebecca Lewis, another employee of the National City Bank, saw an African American male, wearing a brown shirt and a white hat walking into the bank and then leaving the bank. Lewis confirmed, using surveillance videotape, that the man she saw was the one who robbed the bank.

Sean Burgess, employed in an unspecified law enforcement capacity, met with defendant every week for up to ten minutes. Burgess identified defendant as the man in the surveillance videotape and photographs. When asked for the basis of his identification, Burgess stated: "[f]acial recognition. Um, the way the man carried himself, the way the man was described to investigators matches the exact description as how I know him to be. And positive [identification] was made by me through these photographs."

Detective Greg Cordes with the Kalamazoo Department of Public Safety talked with defendant concerning defendant's fingerprints being found on the envelope. Defendant explained to Cordes that he had given the envelope to a person named "Bud." Defendant also told Cordes that he had been fishing on the day the robbery occurred. At a subsequent hearing, Cordes heard defendant say that he went to Kalamazoo before going fishing on the day the robbery occurred.

At trial, defendant produced his mother, Myrtlene Williams, who testified that on the date of the robbery defendant was at her house. The jury convicted defendant as stated above and defendant was sentenced by the trial judge to 95 months to 25 years. This appeal then ensued.

II. ANALYSIS

On appeal, defendant argues that the trial court was clearly erroneous in allowing Cordes' testimony concerning a confidential informant's tip. Defendant argues the trial court clearly erred for two reasons: (1) the testimony elicited violated the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20 and (2) the testimony was unfairly prejudicial under MRE 403.

During trial, the following colloquy occurred between the assistant prosecutor and Cordes:

> *Q*: All right. When was it that you finally developed this particular defendant as a potential suspect?
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> *A*: After looking at numerous suspects, we received a confidential informant tip from a person who gave us a statement that said that either Kevin or Kelvin was the person who had robbed the bank. After I later talked to that confidential informant, they informed me that the last name was Turner also. After doing research in our I-LEADS computer which is our police in house computer, I was able to locate Kevin K-E-V-I-N Turner.

Defendant did not raise his Confrontation Clause claim until his appeal, and therefore the issue is not preserved. *People v Pipes*, 475 Mich 267, 277-278; 715 NW2d 290 (2006). Unpreserved claims of constitutional error are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Pursuant to US Const, Am VI; Const 1963, art 1, § 20, a defendant has the right to be confronted with the witnesses against him. The Confrontation Clause prohibits the admission of out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A statement by an informant to the authorities generally constitutes a testimonial statement. *People v*

Chambers, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004). However, a testimonial statement offered for a purpose other than establishing the truth of the matter asserted is not barred by the Confrontation Clause. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), citing *Crawford*, 541 US at 59 n 9, which states, in relevant part: ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." See *Tennessee v Street*, 471 US 409, 414, 85 L Ed 2d 425, 105 S Ct 2078 (1985).) Thus, if the statement at issue here was offered for a purpose other than the truth of the matter asserted, the State did not violate defendant's rights under the Confrontation Clause.

The statement at issue was elicited by the assistant prosecutor to ascertain when it was that police "developed" defendant as a suspect in this case. The response was that defendant became a suspect when police received a tip from a confidential informant. Hence, the statement was offered not to prove the truth of the matter, but rather to show its effect. This Court has held that " . . . a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Chambers*, 277 Mich at 11; citing *People v Lee*, 391 Mich 618, 642-643; 128 NW2d 655 (1974). Additionally, a statement, such as the one at issue in this case, offered to show why police officers acted as they did, is not hearsay. *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982). Consequently, the trial court did not commit plain error in allowing Cordes' testimony under the Confrontation Clause. *Carines*, 460 Mich at 763.

On appeal, defendant also argues that the testimony's relevance was substantially outweighed by the danger of unfair prejudice. At trial, however, defendant objected to the testimony on the grounds that it was hearsay. This claim is thus not preserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Unpreserved claims of erroneously admitted evidence are reviewed for plain error. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). In general, "all relevant evidence is admissible." MRE 402. "Relevant evidence" means "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

We cannot find that the statement by Cordes presented to the jury was unfairly prejudicial. While Cordes said that the informant provided defendant's name, that fact could have been inferred by the jury from the context of the testimony. Moreover, Cordes' testimony was limited to the statement that he investigated defendant in response to a tip. Cordes did not provide details of surrounding circumstances, and the testimony was given for the purpose of explaining why defendant was investigated as a suspect. Cordes' testimony was not substantially outweighed by the danger of unfair prejudice. Thus, there was no plain error. In reaching our conclusion, we note that defendant's reliance on *People v Wilkins*, 408 Mich 69, 71; 288 NW2d 583 (1980), is misplaced. In that case, our Supreme Court reversed a conviction because the trial court allowed a police officer to testify concerning the details of a confidential tip, including when the crime would occur, where the suspect was, that the suspect was armed, what the suspect would be wearing, the model of his car, and even his license plate number. Our Supreme Court stated that the statement in *Wilkins* went beyond simply providing the reason why the officers acted in the way that they did, the error, was premised on the fact that the statement

offered "also provided the jury with the content of an unsworn statement of an informant who was not produced at trial. This statement pointed to the defendant's guilt of the crime charged." *Wilkins*, 408 Mich at 74. Here, Cordes' testimony did not reveal the content of the informant's tip other than defendant's name. The basis for the finding of prejudice in *Wilkins* is not present in this case.

Even if we found error under either the Confrontation Clause or MRE 403, defendant failed to prove that the admission of the evidence affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763, or that the error was not harmless. See *People v McAllister*, 241 Mich App 466, 469; 616 NW2d 203 (2000). Review of the record reveals that using the bank's surveillance videotape, two people identified defendant as the man who robbed the bank. Additionally, a palm print and a fingerprint found on the envelope left by the perpetrator were matched to defendant. Hence, there was sufficient evidence that defendant robbed the bank, independent of Cordes' testimony. See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The testimony at issue was brief, was a proper response to the question presented, and gave no more information than the name of the defendant. It was not offered to prove that defendant had robbed the bank, but rather for the limited purpose of one of the reasons why the police came to view defendant as a suspect. We therefore hold that the trial court did not commit plain error requiring reversal. *Carines*, 460 Mich at 763.

Defendant next argues that the trial court erroneously scored offense variable (OV) 13, MCL 777.43, at 25 points because there were insufficient facts in the lower court record to support the use of one of defendant's two resisting and obstructing a police officer charges in scoring OV 13. At sentencing, however, defendant raised a legal, not a factual, challenge to the use of the two criminal charges. Defendant failed to preserve the factual sufficiency issue by failing to raise that precise issue at sentencing, in a motion for resentencing, or in a motion to remand. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); MCL 769.34(10). We review an unpreserved offense variable scoring issue for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 275; 651 NW2d 798 (2002).

OV 13 allows the trial court to assign a score of 25 points where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). A "sentencing court may consider all record evidence before it when calculating the guidelines, including . . . the contents of a presentence investigation report . . . ." *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008), quoting *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). A scoring decision for which there is any evidence will be upheld. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Generally, a trial court must determine contested factual matters at sentencing proceedings by the preponderance of the evidence. *People v Callon*, 256 Mich App 312, 333-334; 662 NW2d 501 (2003). However, the defendant must "first mount an effective challenge to invoke his right to a hearing on a contested fact at sentencing and, thus, the need for an evidentiary hearing with a finding by the trial court based upon the preponderance of evidence." *Callon*, 256 Mich App at 334. A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant. *Id*. Here, defendant did not raise a factual challenge to the two prior charges of resisting and obstructing a police officer at trial or at sentencing. Defendant did not mount an effective challenge to invoke his right to a hearing and thus defendant's presentence investigation report is presumed accurate and was justifiably relied

upon by the trial court in scoring OV 13. *Id*. at 333-334. The trial court did not commit plain error requiring reversal when it scored OV 13 at 25 points. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello